FILED BY CLERK
APR 17 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAIME B., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and DEZIREE B., Appellees.	2 CA-JV 2011-0124 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. JD18239800

Honorable Peter Hochuli, Judge Pro Tempore

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 Jaime B., father of Deziree B., born in September 2009, appeals from the juvenile court's October 2011 order terminating his parental rights on the ground that he was convicted of a felony and sentenced to a prison term that deprived the child of a normal home for a period of years. *See* A.R.S. § 8-533(B)(4). Jaime contends (1) there was insufficient evidence to support the court's finding that termination of his rights was in Deziree's best interests; (2) the Arizona Department of Economic Security (ADES) and the court violated his constitutional right to substantive due process by repeatedly denying him the right to visit Deziree while he was incarcerated; and (3) the court interpreted and applied § 8-533(B)(4) erroneously. For the reasons stated below, we affirm.

¶2 Jaime was incarcerated in the Pima County Jail when Deziree was born in September 2009. In October 2010 he was convicted of attempted fraudulent scheme and artifice, a class three felony, sentenced to a prison term of 3.5 years with 576 days' presentence incarceration credit, and moved to a prison in Florence. Deziree's mother, Katelyn C., had been arrested in January 2010 and incarcerated for violating probation. When she was released in July or August 2010, she absconded. At the end of September, ADES filed a dependency petition as to both parents. In January 2011, Jaime admitted the allegations made in an amended dependency petition and Deziree was adjudicated dependent as to him. Among the allegations he admitted were the following: he had been incarcerated since Deziree was born; he had "never provided [Deziree] with any care, support or protection"; and he had "an extensive criminal history," which included domestic violence. The court approved the case-plan goal of reunification and found that

the services outlined in the case plan were "necessary and appropriate to effectuate the case plan goal."

¶3 At the end of February 2011, Jaime filed a motion for visitation. After a combined hearing on the motion and permanency planning on March 18, the juvenile court approved changing the case-plan goal as to both parents to severance and adoption. Also at that hearing, Katelyn admitted the allegations of the amended dependency petition and Deziree was adjudicated dependent as to her mother. Additionally, the court denied Jaime's motion for visitation, finding "it is not in the child's best interest to have visitation with her father." ADES filed a motion to terminate the parental rights of both parents.

¶4 At the initial severance hearing in April, Jaime asked the juvenile court to compel the maternal grandparents with whom Deziree had been placed to bring Deziree to hearings so he could visit her; the court denied this request. Jaime filed another motion for visitation in May; on the first day of the severance hearing in June, his attorney agreed it could be heard "during the course of the severance." Also on the first day of the severance hearing, ADES withdrew its motion to terminate parental rights as to Katelyn. Between the first and second day of the hearing, Jaime filed another motion for visitation, which the court denied. The court subsequently granted ADES's motion to sever Jaime's parental rights, and this appeal followed.

¶5 The juvenile court may sever a parent's rights if clear and convincing evidence establishes that at least one of the statutory grounds for termination exists and that a preponderance of the evidence shows terminating the parent's rights is in the

child's best interests. Ariz. R. P. Juv. Ct. 66(C); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 22, 41, 110 P.3d 1013, 1018, 1022 (2005). We review the termination order and the record before us in the light most favorable to sustaining the court's ruling, affirming unless we conclude "'as a matter of law that no one could reasonably find the evidence [supporting statutory grounds for termination] to be clear and convincing.'" *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009), *quoting Murillo v. Hernandez*, 79 Ariz. 1, 9, 281 P.2d 786, 791 (1955) (alteration in *Denise R.*). We will not disturb the order if there is reasonable evidence in the record that supports the factual findings upon which the order is based. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). We do not reweigh the evidence on appeal; rather, we defer to the juvenile court with respect to any factual findings because, as the trier of fact, that court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). It is for the juvenile court, not this court, to assess the credibility of witnesses before it and weigh the evidence presented. *Id.* ¶ 14. And to the extent there are conflicts in the evidence, the juvenile court must resolve them. *Jesus M.*, 203 Ariz. 278, ¶ 12, 53 P.3d at 207.

¶6 Jaime first contends the juvenile court's finding that termination of his parental rights to Deziree was in the child's best interests is not supported by the record. In order to establish that severance of a parent's rights is in a child's best interests, "the court must find either that the child will benefit from termination of the relationship or that the child would be harmed by continuation of the relationship." *James S. v. Ariz.*

Dep't of Econ. Sec., 193 Ariz. 351, ¶ 18, 972 P.2d 684, 689 (App. 1998). Among the factors the court may consider is whether the child currently is in a home with siblings and with a person who wishes to adopt that child, *see id.* ¶¶ 18-19, or whether the child is adoptable. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 19, 83 P.3d 43, 50 (App. 2004). In its thorough, well-reasoned minute entry order, the court first reviewed the history of this case. With respect to Deziree's best interests, the court noted she had been a dependent child for twelve months "of her short life" and Jaime had "been incarcerated all of her life." The court pointed out that his contact with her had been "minimal," and found that being a parent requires more than minimal contact, particularly in a child's formative years. The court also found that Deziree had been placed with family, referring to the maternal grandparents, that "she has contact with a sibling living there," she is well cared for, her needs are being met, she is adoptable, and she is entitled to permanency. The record amply supports these findings, establishing, too, that Deziree had been with the maternal grandparents for most of her life and that they were willing to adopt her. These findings provide a sufficient basis for the court's conclusion that termination of Jaime's rights to Deziree was in her best interests.

¶7 Jaime suggests the juvenile court did not make specific findings as to how termination of his rights would benefit Deziree and why it would have been harmful or detrimental to her to deny the motion to sever his parental rights. First, the court did enter sufficiently specific findings of fact. The court focused primarily on how termination would benefit Deziree by providing her with the permanency and stability to which she was entitled. As we stated above, the best-interests finding may be based on a

showing that termination would *either* benefit the child or that continuing the parental relationship would be detrimental to the child. *See James S.*, 193 Ariz. 351, ¶ 18, 972 P.2d at 689. Second, to the extent Jaime is complaining that the court should have entered additional findings, he has waived that claim by failing to request such findings by the juvenile court. *See Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 21, 153 P.3d 1074, 1081 (App. 2007) ("We generally do not consider [claims] raised for the first time on appeal.").

¶8 None of Jaime's arguments negates these findings or the juvenile court's legal conclusions. Jaime asserts, for example, that he had numerous visits with Deziree while incarcerated before Katelyn was arrested and that he had expressed to Child Protective Services (CPS) concern about Deziree, which had prompted CPS to investigate her welfare. He cites his efforts to obtain visitation with Deziree as evidence of his love for and commitment to the child. He also cites the general principle, with supporting case law, that it is generally not in a child's best interests for the rights of his or her parents to be terminated, insisting that this is "particularly" true here "because there was no evidence presented whatsoever of a benefit to Deziree by a termination of her father's parental rights." And, he argues, because ADES was continuing efforts to reunify Deziree with Katelyn, termination of his rights cannot help attain permanency for Deziree.

¶9 That Jaime wants to have a relationship with Deziree and requested visits with her while he was incarcerated is not dispositive. As ADES points out in its answering brief, our supreme court stated in *Kent K.* that "the best interests inquiry

focuses primarily upon the interests of the child, as distinct from those of the parent." 210 Ariz. 279, ¶ 37, 110 P.3d at 1021. Additionally, that ADES has continued efforts to reunify Deziree with Katelyn does not mean there was no reasonable evidence to support the juvenile court's best-interests finding as to Jaime. As the case manager pointed out during the severance hearing, regardless of whether Katelyn was successful, it nevertheless was in Deziree's best interests to terminate Jaime's rights because he had no relationship with her, he repeatedly had engaged in criminal conduct, and he had a history of substance abuse, which he had not addressed adequately due to his failure to participate in or complete certain services. The case manager stated Jaime had not demonstrated he had the ability to care for Deziree. Indeed, Jaime testified at the severance hearing that he had been married to the woman who was the victim of his domestic-violence conviction and that they had two other children together, one just four days younger than Deziree, and that he had not been able to support these children while incarcerated. Nor had he provided any support for Deziree. The court's finding that a preponderance of the evidence established termination of Jaime's parental rights was in Deziree's best interests, is supported by the record before us.

¶10 Jaime next contends that by repeatedly denying his requests to visit Deziree, ADES violated his substantive due process rights, "thereby failing to make a good faith effort to preserve the family." Jaime concedes ADES had no statutory duty to provide him with reunification services. *See James H. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 1, ¶¶ 7-8, 106 P.3d 327, 328 (App. 2005). But, citing *James H.*, he contends the "Arizona Supreme Court has recognized" that notwithstanding the absence of a statutory

requirement, ADES nevertheless was required to afford him visitation because "there is still a constitutional requirement that appropriate reunification service[s] be provided before a parent's rights to his child can be terminated" pursuant to § 8-533(B)(4).

¶11 Jaime is correct that an incarcerated parent retains the right to reasonable visitation with his or her children, and his reliance on *Michael M. v. Arizona Department of Economic Security*, 202 Ariz. 198, ¶ 8, 42 P.3d 1163, 1165 (App. 2002), for that general proposition is correct. We acknowledged in that case that visitation is a form of reunification service. *Id.* ¶ 9. But as ADES points out, the juvenile court's April 2011, May 2011, and June 2011 orders denying Jaime's requests for visitation were final, appealable orders from which Jaime did not appeal. *See Lindsey M. v. Ariz. Dep't of Econ. Sec.*, 212 Ariz. 43, ¶¶ 7-8, 127 P.3d 59, 61 (App. 2006); *In re Maricopa Cnty. Juv. Action No. JD-5312*, 178 Ariz. 372, 374, 873 P.2d 710, 712 (App. 1994) (holding "juvenile court's order terminating visitation is a final order because it conclusively defines appellant's rights regarding visitation of her children"). And *Michael M.* involved an appeal from an order denying the father's motion for visitation. 202 Ariz. 198, ¶ 1, 42 P.3d at 1163. Therefore, it is of limited applicability here. Jaime may not challenge now the propriety of these individual rulings on appeal from the October 2011 termination order.

¶12 As for the denial of visitation requested during the severance hearing, the juvenile court denied that request both expressly and implicitly by the termination of Jaime's parental rights. And the termination of his rights rendered moot that final request

for visitation. *Cf. id.* ¶ 13 (finding courtroom-visitation issue moot given disposition of appeal).

¶13 But even if we consider his challenges within the broader context of his contention that ADES did not satisfy its obligation to provide him with reunification services, he has not established any basis for disturbing the juvenile court's ruling. First, contrary to Jaime's assertion, *James H.* was not decided by our supreme court but by Division One of this court. Second, the court did not hold in that case that ADES has such an obligation; rather, relying on its earlier decision in *Mary Ellen C. v. Arizona Department of Economic Security*, 193 Ariz. 185, 971 P.2d 1046 (App. 1999), the court simply acknowledged "that with respect to severance in general there may be a constitutional obligation on the Department to engage in reunification efforts." 210 Ariz. 1, ¶ 8, 106 P.3d at 328. Instead of deciding whether there was such a duty, the court observed in *James H.*, as it had in *Mary Ellen C.*, that there is no constitutional requirement to provide a parent reunification services when such services would be futile. 210 Ariz. 1, ¶ 8, 106 P.3d at 328; *see Mary Ellen C.*, 193 Ariz. 185, ¶ 34, 971 P.2d at 1053. And in *James H.* the court reasoned, with respect to the termination of the father's rights based on the lengthy prison term he was serving rather than the nature of his felony conviction, that reunification services would have been futile because "prolonged incarceration is something neither the Department nor the parent could ameliorate through reunification services." 210 Ariz. 1, ¶ 9, 106 P.3d at 329.

¶14 The court added in *James H.*: "The damage to the parent-child relationship that justifies severance stems from the enforced physical separation of the parent from the

child, and nothing the Department has to offer in the way of services can affect that reality." *Id.* Thus, the court concluded, even if he were given and participated in services, the father could not change the fact that he remained unable to provide the child a "normal home" while he was in prison; under those circumstances, it would have been futile to provide the father with such services. *Id.* Even if we were to agree with Jaime that there is a substantive due process right to reunification services, including visitation, we see no reason why the court's reasoning in *James H.* does not apply here as well, nor has Jaime distinguished this case from *James H.* Finally, we agree with ADES that based on the record before us, we cannot say the juvenile court abused its discretion in refusing to require ADES to provide the service of visitation. Here, unlike in *Michael M.*, 202 Ariz. 198, ¶ 13, 42 P.3d at 1166, evidence at the severance hearing establishes visitation with Deziree would be harmful.

¶15 Jaime next contends the juvenile court misinterpreted and therefore misapplied § 8-533(B)(4). He argues the court incorrectly considered the "longest possible sentence" in determining the length of his prison term instead of his possible release date, in light of "expert testimony" establishing the "best evidence" of his true release date. But the court was required to consider the entire prison term imposed, "not whether the parent may be parole eligible within that time." *James S.*, 193 Ariz. 351, n.3, 972 P.2d at 687 n.3. Moreover, the court's minute entry belies Jaime's contention that it misapplied the law, establishing the court correctly interpreted the statute, applied it correctly, and considered the factors our supreme court deemed relevant in *Michael J. v. Arizona Department of Economic Security*, 196 Ariz. 246, ¶ 29, 995 P.2d 682, 687-88

(2000), to the inquiry under § 8-533(B)(4). Citing *Arizona Department of Economic Security v. Matthew L.*, 223 Ariz. 547, 225 P.3d 604 (App. 2010), the juvenile court also conducted the requisite individualized, case-specific inquiry, making clear the basis for its conclusion that under any calculation, by the time of the severance hearing Deziree already had been deprived of a normal home because of Jaime's incarceration, and that this would continue after the hearing ended. No purpose would be served by restating the court's findings and conclusions in their entirety here. Rather, because the record supports the court's order, we adopt it. *See Jesus M.*, 203 Ariz. 278, ¶ 16, 53 P.3d at 207-08.

¶16 For the reasons stated, we affirm the juvenile court's termination of Jaime's parental rights to Deziree.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge